COMMENTARY

IS THIS REALLY NECESSARY?

FORCED DISSEMINATION OF INFORMATION ABOUT CONSUMER ORGANIZATIONS: LESSONS FROM ILLINOIS' EXPERIENCE

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Introduction

In the Summer 1988 edition of the *California Regulatory Law Reporter*, Kenneth C. Crowley examined government efforts to strengthen consumers' representation in public utility regulatory proceedings by requiring the inclusion of messages regarding consumer groups in utility billing statements.[1] That subject—and broader issues related to the government's ability to require someone to disseminate information intended to assist organizations opposed to that person's interest—are particularly timely in light of the California voters' recent passage of Proposition 103.[2] The California initiative measure enacts a broad range of reforms to the state's insurance industry, including a requirement that automobile insurance companies enclose with their policy renewal statements a notice regarding the existence of an organization that represents consumers' interests in insurance-related matters.[3]

The history of Illinois' efforts to promote its legislatively created Citizens Utility Board (CUB)—initially, by authorizing CUB to include messages in public utility billing statements, and later, by permitting CUB to distribute promotional materials in mailings by state agencies—offers important lessons to those in California who support or oppose efforts to promote consumer organizations. As explained below, that history counsels against uncritical acceptance of Mr. Crowley's conclusion that CUBs can avoid the First Amendment issues inherent in forced disclosure schemes by arguing that they are merely acting as an arm of the government. Moreover, the Illinois experience offers an alternative means of effectively promoting consumer organizations that does not impose forced disclosure requirements on the ideological opponents of those organizations.

Limitations on the "Arm-of-Government" Argument

Crowley's "primary recommendation" for achieving the goal of implementing "a comprehensive insert program which will best benefit consumers and withstand constitutional scrutiny" is to grant state-created CUBs access to utilities' billing envelopes.[4] Crowley's recommendation is based on his belief that the strictures of *Pacific Gas & Electric Co. v. Public Utilities Comm'n*,[5] a U.S. Supreme Court decision holding unconstitutional a California Public Utilities Commission order granting a private consumer organization the right to include promotional materials in a utility's billing envelopes, do not apply to state-created consumer groups.[6] The discussion below reveals that Crowley's argument overstates the importance, for purposes of constitutional analysis, of the public or private status of the organization whose messages are disseminated.

The Constitutionality of Forced Dissemination of a Governmentally Prescribed Message. Relying on language in *PG&E* recognizing that the state has "substantial leeway in determining appropriate information disclosure requirements for business corporations,"[7] Crowley argues that enclosures in utility billing statements from a state-created consumer organization would constitute a permissible "legal notice."[8] However, as Crowley himself recognizes, this argument was rejected by the Seventh Circuit in *Central Illinois Light Co. v. Citizens Utility Board*.[9] That lawsuit involved a challenge by Illinois public utilities to provisions in the Illinois Citizens Utility Board Act[10] that required the utilities, up to four times per year, to include with their billing statement messages from the Citizens Utility Board.[11] Unlike TURN, the private citizens' organization which benefited from access to a utility's billing envelopes in *PG&E*, the Illinois CUB is "a nonprofit public body corporate and politic."[12] The court of appeals nevertheless held that "[t]he statutory scheme created by [the CUB Act]...is, in all material respects, constitutionally indistinguishable from the CPUC order struck down by the Court in *Pacific Gas*."[13]

While there are other grounds for disagreeing with the outcome of *Central Illinois Light*,[14] the district court in that case correctly held that "negative free speech" rights not to participate in the communication of messages with which one disagrees include the right not to promote objectionable messages from public, as well as private, entities.[15] This principle is illustrated by the Supreme Court's 1943 decision in the "flag-salute case," *West Virginia State Board of Education v. Barnette*,[16] in which the Court held unconstitutional a state-imposed requirement that all children attending public schools recite the Pledge of Allegiance. The plaintiffs, Jehovah's Witnesses, considered the Pledge to violate their religious beliefs. Writing for the Court, Justice Jackson recognized the plaintiff's right not to participate in the dissemination of the state's prescribed message: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[17]

Wooley v. Maynard[18] made it clear that the constitutional prohibition against forced dissemination of the government's ideological messages applies

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**Editor's Note: The Center for Public Interest Law welcomes and encourages responses to articles published in the* California Regulatory Law Reporter. *The author, a partner in the law firm of McDermott, Will & Emery, served as one of the attorneys for the Illinois Citizens Utility Board in* Central Illinois Light Co. v. Citizens Utility Board, *an action brought by public utilities challenging provisions in Illinois' CUB Act that authorized CUB to include promotional materials in the utilities' billing statements. Mr. Pflaum was a principal author of legislation enacted in response to the* Central Illinois Light *litigation that authorized CUB to submit enclosures in mailings by state agencies. Mr. Pflaum's response to the feature article in the Summer 1988 issue of the* Reporter *is published in its entirety.*

even where the speaker is not required to affirm his or her acceptance of the government's views. In *Wooley*, some New Hampshire residents challenged a law requiring them to display the state motto, "Live Free or Die," on their vehicle license plates. Unlike compelled recitation of the Pledge of Allegiance, display of the state motto on license plates does not require affirmation of the state's message. The Court found this distinction to be irrelevant, holding that "[t]he First Amendment protects the right of individuals...to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable."[19] The Court described the essence of the constitutional violation in both *Barnette* and *Wooley* as the requirement that someone "be an instrument for fostering public adherence to an *ideological point of view* he finds unacceptable."[20] It makes no difference that the objectionable ideological point of view happens to belong to the government.

Consequently, the applicability of the legal notices exception to the constitutional prohibition against forced dissemination of speech depends on more than just the public or private status of the person whose message one is compelled to disseminate. As explained below, the content and, possibly, the purpose of that message—that is, whether (1) it contains ideological speech or merely factual, uncontroversial information; and (2) the message is intended to prevent deceptive commercial speech by the person who is forced to disseminate that message, or promote the interests of that person's ideological opponent—determine whether or not the message is a permissible legal notice.

Applicability of the Legal Notices Exception: The Zauderer Doctrine. The leading case regarding the constitutionality of compelled dissemination of legal notices is *Zauderer v. Office of Disciplinary Counsel.*[21] Zauderer arose out of an attorney disciplinary proceeding regarding alleged violations of various Ohio disciplinary rules pertaining to attorney advertising, including one rule that required lawyer advertisements to disclose that clients in contingency fee cases could be liable for significant litigation costs even if their lawsuits were unsuccessful. In upholding this forced disclosure rule, the Court stressed that Ohio was simply requiring the lawyer to "include in his advertising *purely factual and uncontroversial information* about the terms under which his services will be available. Because the expansion of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,...appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal."[22]

The scope of this holding remains unclear. Although the *PG&E* plurality held that *Zauderer* was inapplicable to the ideological messages that TURN was authorized to distribute, it broadly characterized the *Zauderer* holding: "The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985). Nothing in *Zauderer* suggests, however, that the State is equally free to require corporations to carry the messages of third parties, where the messages themselves are biased against or are expressly contrary to the corporation's views."[23]

After *PG&E*, the crucial issue regarding the scope of the legal notices exception is whether, under that doctrine, (a) one may be forced to disseminate information about one's ideological opponent as long as that information is factual and uncontroversial, or (b) one may only be forced to disseminate factual information necessary to avoid the possibility that one's own commercial speech could be deceptive. Once again, the experience with Illinois' CUB Act is illuminating. In *Central Illinois Light*, the Seventh Circuit held that, "[w]hile *Zauderer* holds that sellers can be forced to declare information about themselves needed to avoid deception, it does not suggest that companies can be made into involuntary solicitors for their idealogical [sic] opponents."[24] If the Seventh Circuit's holding is correct, it bodes ill for any attempt—through "legal notices," consumer advocacy check-off inserts, or otherwise[25]—to require utilities (or anyone else) to participate in efforts to assist their opponents. All such efforts involve requiring persons to serve as "involuntary solicitors" for their opponents.

However, there is reason to question such a narrow interpretation of *Zauderer*. The Court in *PG&E* could have easily rejected TURN's reliance on *Zauderer* by holding that the legal notices exception was limited to commercial speech and did not apply to disclosures intended to assist the utility's opponents. Instead, the Court stressed the ideological content of TURN's messages, observing that "the messages themselves are biased against or are expressly contrary to the corporation's views."[26] That language would appear to leave open the possibility that it would have been permissible, under *Zauderer*, to require the utility to carry "factual and uncontroversial"[27] inserts from TURN.

A broader interpretation of *Zauderer* —one that would apply a deferential standard of review to forced dissemination of factual information about the disseminator's ideological opponents— is also consistent with the concern repeatedly expressed by the Court in other negative free speech cases about the compelled dissemination of ideological speech.[28] Perhaps due to the CUB Act's express limitations on the content of the speech in CUB's enclosures,[29] the Seventh Circuit's *Central Illinois Light* decision does not focus on the nature of the speech that the utilities were being forced to disseminate. Instead, that decision appears to be implicitly based on protecting utilities' "negative freedom of association rights"--that is, their freedom not to be "associated" in their billing statements with a group that they oppose.[30]

This reasoning rests on questionable constitutional footing. Prior forced association cases have tended to involve some form of impact on free speech rights.[31] Consequently, unless forced association with an opponent's factual and uncontroversial messages necessarily infringes free speech rights, that form of forced association may be permissible.[32]

Testing the Limits of Zauderer: The Forced Disclosure Provisions of Proposition 103. The forced disclosure requirements in California's insurance reform initiative, Proposition 103, may provide an opportunity to determine the limits of the *Zauderer* decision. Proposition 103 adds section 1861.10(c) to California's Insurance Code, which states in pertinent part:

> "(c)(1) The [California insurance] commissioner shall require every insurer to enclose notices in every policy or renewal premium bill informing policyholders of the opportunity to join an independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum. This organization shall be established by an interim board of public members designated by the commissioner and operated by individuals who are democratically elected from its membership....
>
> (2) The commissioner shall by regulation determine the content of the enclosures and other pro-

cedures necessary for implementation of this provision...."[33]

Proposition 103's express limitation on the content of the notices to "informing policyholders of the opportunity to join an independent, non-profit corporation which shall advocate the interests of insurance consumers in any forum" would appear to ensure that the notices will consist solely of "factual and uncontroversial information."[34] Moreover, unlike the forced disclosure schemes invalidated in *PG&E* and *Central Illinois Light*, Proposition 103 contains an additional safeguard against ideological messages by providing that the text of the messages will be determined in the first instance by a presumably neutral government official.[35] Assuming that this forced disclosure requirement is reasonably related to a legitimate state interest, section 1861.10(c) should, therefore, be constitutional unless, as the Seventh Circuit has concluded, *Zauderer* does not sanction requiring insurance companies to "be made into involuntary solicitors for their idealogical [sic] opponents."[36]

Although several lawsuits have been filed against various provisions of Proposition 103, the constitutionality of the forced disclosure provision in Insurance Code section 1861.10(c) does not presently appear to be a focus of those challenges. However, if an authoritative decision of the constitutionality of that provision ever were rendered, it likely would determine the validity of *any* forced disclosure provisions, including more modest programs such as consumer advocacy check-offs.[37] In short, Proposition 103 provides an ideal opportunity to determine whether or not *Zauderer* authorizes forcing someone to disseminate factual and uncontroversial information about an ideological opponent.

An Alternative Solution: Distributing Notices Through State Mailings

Following the invalidation of the Illinois CUB Act's forced disclosure provision in the *Central Illinois Light* litigation, the Illinois General Assembly passed a statute intended to provide another means of promoting the Illinois CUB.[38] The new law authorizes CUB to submit enclosures in certain mass mailings by state agencies, such as income tax refunds and driver's license renewals.[39] By not requiring the utilities to participate in efforts intended to assist their ideological opponent, the Illinois statute largely avoids the First Amendment issues inherent in any forced access provision.

There are, to be sure, some obvious limitations to the Illinois approach. First, one would expect that including inserts about a utility consumers organization in, for example, vehicle license plate renewals would not be as effective in promoting that organization as including such inserts in utility bills. Nevertheless, the new Illinois law has proven successful. With the assistance of inserts in state mailings, the Illinois CUB has been averaging more than 4,000 new members per month and has reached a total membership of more than 100,000.[40] CUB is receiving approximately the same response rate that it did to its previous enclosures in utility billing statements.[41]

Second, there are practical limits to the number of different consumer organizations—even state-created organizations—that can be promoted in state mailings. The approach taken by Proposition 103, on the other hand, has the advantage of being adaptable to establish and promote state-created consumer organizations in a virtually unlimited number of areas, leaving open the possibility that similar groups and similar compelled disclosure provisions could be created in areas of interest to consumers such as health care, product liability, and financial counseling, among others.

On balance, I believe that, at least until the constitutionality of the kind of forced disclosure scheme contained in Proposition 103 is clearly established, the stronger constitutional basis for the state-mailing concept employed in Illinois outweighs the potential advantages of any forced-disclosure scheme. The Illinois model warrants serious consideration by those seeking to strengthen the voice of consumers in public utility matters and other important consumer issues.

Conclusion

Illinois' experience with its Citizens Utility Board reveals that, rather than turning on the public or private status of the consumer group whose message is disseminated, the constitutionality of forced-access schemes to promote consumer organizations is likely to turn on the authorized content of the messages and whether or not the legal notices exception extends to disclosures intended to assist the ideological opponents of the disclosing parties. The Illinois experience is also noteworthy for its successful pioneering of a means of promoting its CUB that largely avoids the potential constitutional problems inherent in forced disclosure schemes.

FOOTNOTES

1. Crowley, *Access to Public Utility Billings Envelopes: The Changing Fortunes of Consumer Representation in PUC Proceedings*, CRLR Vol. 8, No. 3 (Summer 1988) at 1.

2. Proposition 103, "Insurance Rates and Regulation Initiative Statute" (enacted November 8, 1988).

3. *Id.* at § 3 (to be codified at Cal. Ins. Code section 1861.10(c)).

4. Crowley, *supra* note 1, at 6-7.

5. 475 U.S. 1 (1986) (hereinafter "*PG&E*").

6. Crowley, *supra* note 1, at 6-7.

7. *PG&E*, *supra* note 6, at 15 n.12.

8. Crowley, *supra* note 1, at 6-7.

9. 827 F.2d 1169 (7th Cir. 1987), *aff'g* 645 F. Supp. 1474 (N.D. Ill. 1986) (hereinafter "*Central Illinois Light*").

10. Ill. Rev. Stat. ch. 111 2/3, §§ 901-921 (1988).

11. Ill. Rev. Stat. ch. 111 2/3, §§ 909, 910 (1986), *amended by* 1987 Ill. Laws P.A. 85-879.

12. Ill. Rev. Stat. ch. 111 2/3, § 904 (1988). While the Illinois CUB does not consider itself to be a state agency (*see Central Illinois Light*, *supra* note 10, 645 F. Supp. at 1484 n.11), it recognizes its status as an independent arm of the State of Illinois.

13. *Central Illinois Light*, *supra* note 9, 827 F.2d at 1174.

14. *See, e.g.*, *infra* text accompanying notes 26-32.

15. *Central Illinois Light*, *supra* note 9, 645 F. Supp. at 1484 n.11.

16. 319 U.S. 624 (1943).

17. *Id.* at 642.

18. 430 U.S. 705 (1977).

19. *Id.* at 715.

20. *Id.* (emphasis added).

21. 471 U.S. 626 (1985).

22. *Id.* at 651 (first emphasis added; citations omitted).

23. *PG&E*, *supra* note 5, at 15 n.12.

24. *Central Illinois Light*, *supra* note 9, 827 F.2d at 1173.

25. *See* Crowley, *supra* note 1, at 4-6.

26. *PG&E*, *supra* note 5, at 15 n.12. Earlier Supreme Court cases foreshadowing the legal notices exception had involved commercial speech. *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In re R.M.J.*, 455 U.S. 191 (1982).

27. *See Zauderer*, *supra* note 21, at 651.

28. *See supra* text accompanying note 20.

29. *See infra* note 35.

30. *See Central Illinois Light*, *supra*

note 9, 827 F.2d at 1173.

31. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 256-57 (1974) (First Amendment was violated by Florida statute requiring newspapers to publish responses to articles critical of a candidate's character or record); *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-36 (1977) (non-union member's First Amendment rights were violated by subsidization, through mandatory payment of union dues, of union's political activities). *But cf. PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87-88 (1980) (shopping center owner may be required to permit leafletting activities where there is no potential for confusion regarding the source of the messages being distributed).

32. Such infringement of free speech rights could take one of two forms: the forced disclosure could cause those disseminating the consumer groups' messages ("the disseminators") to alter their own speech to avoid having to carry responses from consumer groups; or it could impel them to speak when they would otherwise prefer to remain silent. However, there should be little risk that the disseminators will limit their own speech as long as the consumer group is precluded from employing ideological speech in the enclosures. *Cf. PG&E, supra* note 5, at 13-14 (since there were no limits on TURN's speech, the utility might choose to avoid saying anything controversial to reduce the chance that it would be forced to disseminate contrary views from TURN). The more difficult question is whether someone who is forced to disseminate a factual and uncontroversial message about an opponent will inevitably be compelled "to speak where [one] would prefer to remain silent." *Id.* at 18. The *PruneYard* decision, *supra* note 31, suggests that it may be possible to reduce the risk of such infringement of negative free speech rights by using disclaimers that clearly identify the source of the consumer group's message and explain that the disseminator is required by law to include the message in its mailing. *Id.* at 87.

33. Proposition 103, *supra* note 2.

34. *See Zauderer, supra* note 21, at 651. At a minimum, section 1861.10(c) is reasonably susceptible to such an interpretation if a narrowing construction is necessary to preserve the constitutionality of that statute. *Cf. Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961) (narrowly construing the Railway Labor Act to avoid a First Amendment issue).

35. *See supra* text accompanying note 33. In contrast to these limitations on the content of the messages authorized by Proposition 103, the plurality in *PG&E* concluded that TURN was "free to use the billing envelopes to discuss any issues it chooses." 475 U.S. at 14 (footnote omitted). Similarly, while the point was debatable, the district court in *Central Illinois Light* concluded that the CUB Act "allows CUB to present any number of messages, including controversial and biased messages." 645 F. Supp. at 1485.

The California insurance consumers organization would be wise to ensure that the insurance commissioner does not authorize any ideological messages in the notice accompanying policy renewal statements. Prior ideological enclosures by the Illinois CUB appeared to influence the district court's determination that, despite language in the CUB Act expressly limiting the enclosures to "informing the reader of the purpose, nature and activities" of CUB, the Act necessarily permitted ideological speech. *Id.*; *see also id.*, 827 F.2d at 1171 n.2, 645 F. Supp. at 1484 n.9.

36. *Id.*, 827 F.2d at 1173.

37. *See* Crowley, *supra* note 1, at 7.

38. 1987 Ill. Laws P.A. 85-879, *amending* Ill. Rev. Stat. ch. 111 2/3, § 909.

39. Ill. Rev. Stat. ch. 111 2/3, § 909 (1988) provides in pertinent part:

> Section 9. Mailing procedure.
>
> (1) As used in this Section:
>
> (a) "Enclosure" means a card, leaflet, envelope or combination thereof furnished by the corporation [CUB] under this Section.
>
> (b) "Mailing" means any communication by a State agency that is sent through the United States Postal Service to more than 50,000 persons within a 12-month period.
>
> (c) "State agency" means any officer, department, board, commission, institution or entity of the executive or legislative branches of State government.
>
> (2) To accomplish its powers and duties under Section 5 of this Act, the corporation, subject to the following limitations, may prepare and furnish to any State agency an enclosure to be included with a mailing by that agency.
>
> (a) A State agency furnished with an enclosure shall include the enclosure within the mailing designated by the corporation.
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> (c) An enclosure furnished by the corporation under this Section shall be limited to informing the reader of the purpose, nature and activities of the corporation as set forth in this Act and informing the reader that it may become a member in the corporation, maintain membership in the corporation and contribute money to the corporation directly.

40. Telephone interview with Martin R. Cohen, Administrative Director of the Illinois CUB (Dec. 14, 1988).

41. *Id.*